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No. 87-2060

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

KENNETH N. MORAN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On May 5, 1986, petitioner Ken Moran was charged by information with the crimes of forgery by accountability, a felony, or in the alternative, conspiracy to commit forgery, a felony. On May 28, 1986, Moran was charged with two counts of witness tampering, both felonies. Because the witness tampering "arose" out of the forgery charges, and because much of the same testimony would be required for both trials, the district court ordered consolidation of both cases on June 16, 1986.

Both cases came on for trial before a jury on September 22, 1986. A jury was empaneled and sworn, and during the afternoon of September 22, the State presented the testimony of three witnesses. On the morning of September 23, 1986, before further testimony was heard, the court *sua sponte* declared a mistrial. The court found manifest necessity for its ruling and scheduled a second trial. The matter was then transferred to a second judge. This judge granted the defendant's motion to dismiss the case on grounds of double jeopardy, finding no "manifest necessity."

The State appealed to the Montana Supreme Court, which court reversed the second judge's dismissal of the case and remanded it for a new trial. The Montana Supreme Court, on the basis of a review of the whole record, concluded that "the trial judge exercised sound discretion when he found manifest necessity for mistrial." The petitioner seeks a writ of certiorari from this decision.

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ARGUMENT

I. THE MANIFEST NECESSITY STANDARD.

As the Court is well aware, and as the petitioner has stated, the "classic formulation" of the test to be applied in reviewing the declaration of a mistrial, was Mr. Justice Story's pronouncement in *United States v. Perez,* 1 U.S. (9 Wheat.) 579, 580, 6 L. Ed 165 (1824), that there must be "manifest necessity" for the declaration. Almost 150 years later, this Court offered the following interpretation of "manifest necessity":

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.

Illinois v. Somerville, 410 U.S. 458, 464, 93 S. Ct. 1066, 1070 (1973). In its review of the record in this case, the Montana Supreme Court agreed with the trial judge's determination that the ineffective assistance of defense counsel constituted a "manifest necessity" for declaring a mistrial.

In its assessment of "manifest necessity," this Court has said that it will examine the circumstances surrounding the declaration of a mistrial and as the trial judge's deference to the "public justice" factor increases, a reviewing court's deference to the trial court's determination should likewise increase. *Arizona v. Washington,* 434 U.S. 497, 507-10, 98 S. Ct. 824, 831-32 (1978). In this case, the prosecution vigorously opposed the trial judge's determination that defense counsel's inexperience was resulting in ineffective assistance of counsel and jeopardizing the defendant's right to a fair trial. The trial judge's

decision was clearly made in the interests of public justice on the basis of the facts available to him. That decision should receive a high degree of deference.

II. INEFFECTIVE ASSISTANCE OF COUNSEL AS "MANIFEST NECESSITY."

The Montana Supreme Court declared that, in this case of an interrupted trial, the test set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1978), concerning denial of effective assistance of counsel was not applicable, but that "the standard upon review of a decision to order mistrial is whether the trial court exercised sound discretion." However, in assessing the trial judge's exercise of his discretion in declaring a mistrial due to ineffective assistance of counsel, it is instructive to keep in mind the standards set by this Court for evaluating an attorney's performance.

In *Strickland,* denial of effective assistance of counsel was linked to the defendant's right to a fair trial (466 U.S. at 686, 104 S. Ct. at 2064). Similarly in this case, the trial judge viewed defense counsel's inexperience and courtroom performance in the light of the "public justice" factor and the defendant's right to a fair trial. In addition to the deference due the trial judge's determination because of its basis in "public justice," *Strickland* offers other reasons for deferring to the trial judge.

The ineffective assistance in this case must initially be examined from the vantage point of *Strickland's* two standards: unprofessionally deficient performance and actual prejudice. Undoubtedly, some measure of prejudice results when the defendant is subject to a second

trial. However, as the Montana Supreme Court said, it would be impossible to prove actual prejudice in an interrupted trial. On the other hand, this Court said several things in *Strickland* that indicate that the trial judge is in the best position to assess a deficient performance.

In Section III of the decision, 466 U.S. at 687-90, 104 S. Ct. at 2064-65, this Court refers to counsel's duty to "render the trial a reliable adversarial testing process," the "variety of circumstances faced by defense counsel," the reviewing court's duty to "eliminate the distorting effects of hindsight," and "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." All these factors militate in favor of the reviewing court's deference to the trial court. In this case the Montana Supreme Court properly recognized that the trial judge was not subject to the distorting effects of hindsight, had observed counsel's performance in the circumstances of the trial, and had acted in the defendant's best interests by declaring a mistrial.

In later cases elaborating on the *Strickland* tests for ineffective assistance of counsel, stress has been placed on "external factors." *Murray v. Carrier*, 106 S. Ct. 2639, 2646 (1986). In this case the petitioner attempts to elicit sympathy with allegations regarding the alleged underfunding of the public defender's office. It is not clear whether counsel's inexperience should be viewed as an "internal" or "external" factor in his ineffectiveness (just as the purposefulness of the decision not to contest the introduction of the *Miranda* rights card does not absolve the decision of the criticism that it makes no sense). The respondent submits that the crucial fact here is that the

record does not reveal any attempt by counsel to associate more experienced counsel for trial, thus curing his inexperience.

III. THE DECISION OF THE MONTANA SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS.

The federal circuit court decisions which the petitioner cites in support of his position are distinguishable from this case because they involve factors other than counsel's courtroom performance. In *Douglas v. United States,* 488 A.2d 121 (D.C. 1985), for example, although the reviewing court reversed the trial judge's *sua sponte* declaration of a mistrial, the reasons given show that case to be significantly different from the case at bar. In *Douglas,* the trial judge concluded that there was ineffective assistance of counsel because the defendant filed a complaint against his lawyer on an unrelated matter several weeks earlier. The trial judge held a hearing and concluded that counsel's trial performance was not deficient, but the judge concluded that attorney and client had a conflict of interest and that there was no alternative other than to declare a mistrial (488 A.2d at 139). In the case at bar, on the other hand, the trial judge's finding of "manifest necessity" was based solely on counsel's courtroom performance.

In *Braxton v. United States,* 395 A.2d 759 (D.C. 1978), a factor other than counsel's courtroom performance was again found to be the reason for the trial judge's determination of a mistrial. The intense conflict between the defense attorney and the judge was found by the reviewing court to have resulted in the trial judge's discretion being

"improperly influenced by factors extraneous to both the rights of the accused and the public interest in just adjudication." (395 A.2d at 771.) In this case, there has been no allegation that the trial judge's exercise of his discretion was anything other than dispassionate.

The cases of *Abdi v. Georgia*, 744 F.2d 1500 (11th Cir. 1984), and *Wright v. United States*, 365 A.2d 365 (D.C. 1976), are instructive, as they both involved *sua sponte* declarations of mistrial based solely on defense counsel's courtroom performance. In both these cases, reviewing courts upheld the determinations.

IV. SUFFICIENT BIAS WAS SHOWN TO SUPPORT THE MONTANA SUPREME COURT'S AFFIRMATION OF THE TRIAL COURT'S DETERMINATION.

The petitioner seeks to limit the discussion of bias to the introduction of the unsigned rights cards. This was clearly not the sole basis of either the trial judge's or the Montana Supreme Court's decision. As the court makes clear several times (petitioner's appendix at B5, B8, B12, and B14), their decision is based on the whole record and the rights card incident is but a single example.

The cases cited by the petitioner in support of the proposition that bias cannot be assumed may be easily distinguished. In the first place, the Montana Supreme Court did not assume bias, it found it, based on an examination of the entire record. The cases cited by the petitioner all turn on the trial court's unwarranted assumptions of bias. In *United States v. Sanders*, 591 F.2d 1293 (9th Cir. 1979), the court of appeals concluded that the trial court had found prejudice to the defendant based on

a prosecution witness' perjured testimony. However, it was clear to the reviewing court that the perjured testimony would have benefited the defendant. 591 F.2d at 1298. The cases of *United States v. Horn*, 583 F.2d 1124 (10th Cir. 1978), and *United States v. Starling*, 571 F.2d 934 (5th Cir. 1978), involve clearly inadequate interrogations of jurors by trial judges; this case involves a direct observation by the trial judge of an attorney's performance.

The respondent respectfully submits that this Court need not substitute its review of the record in this case for that of the Montana Supreme Court. As this Court said in *Arizona v. Washington, supra:*

> Since the record provides sufficient justification for the state court ruling, the failure to explain that ruling more completely does not render it constitutionally defective.

434 U.S. at 517, 98 S. Ct. at 836.

CONCLUSION

The Montana Supreme Court, after examining the whole record, found that the trial judge in this case had properly determined that the defendant was not receiving effective assistance of counsel, and that there was "manifest necessity" for the declaration of a mistrial. The trial court's decision was based solely on counsel's courtroom performance, and the Montana Supreme Court's decision was consistent with the cases on "manifest necessity" decided by this Court and the lower federal

courts. The petition for certiorari filed herein should not be granted.

Respectfully submitted,

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